Supreme Court, U.S.
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No. 04-163

IN THE

Supreme Court of the United States

LINDA LINGLE, GOVERNOR OF THE STATE OF HAWAII, and MARK J. BENNETT, ATTORNEY GENERAL OF THE STATE OF HAWAII,

Petitioners,

v.

CHEVRON U.S.A. INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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October 5, 2004

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's rules, respondent Chevron U.S.A. Inc. ("Chevron") states that it is an indirectly wholly-owned subsidiary of ChevronTexaco Corporation, which is a publicly traded company, through the following intermediate entities: Chevron U.S.A. Holdings Inc., Texaco Inc., Chevron Asiatic Limited, Chevron Texaco Overseas Petroleum Inc., Texaco Exploration and Production Inc., and TEPI Holdings Inc.

SUPPLEMENTAL BRIEF FOR RESPONDENT

The issue raised by the Supreme Court of Connecticut's decision in *Kelo v. City of New London*, 843 A.2d 500 (Conn.) (en banc), *cert. granted*, No. 04-108 (2004), is unrelated to that raised by Hawaii's petition in this case. The decision below is no more worthy of *certiorari* when considered in conjunction with *Kelo* than it is standing alone.

1. As petitioners concede, Supp. Br. for Petitioners at 1, *Kelo* and the decision below involve distinct issues under the Taking Clause. *Kelo* addresses the "public use" requirement, U.S. Const. art. V, a threshold requirement that must be satisfied for a State to assert eminent domain power. The question there is whether it is a "public use" for the government to take a person's property for private economic development purposes — an issue this Court has not specifically addressed and on which the lower courts have reached sharply differing conclusions.

The decision below does not involve any question of "public use." Nor does it arise from a State's attempt to exercise its eminent domain power. Instead, it involves one strand of this Court's regulatory Taking jurisprudence, which applies where the State *refuses* to invoke its eminent domain power. The question in a regulatory takings case such as this is not whether the government is acting for a "public" purpose, but rather whether the regulation nonetheless "goes too far" in burdening private property interests in relation to that asserted public purpose. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Although conceding that the issues are different, petitioners assert that they should be considered together because both involve "substantive limitations . . . on government action." Supp. Br. for Petitioners 1. But petitioners do not explain why the resolution of one of these

separate limitations should bear on the other. Nor is any such reason apparent. The "public use" requirement and the regulatory takings doctrine serve different purposes and protect differing interests. Unsurprisingly, *Kelo* does not even mention the substantial advancement test, and does not cite *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), or any other substantial advancement precedent. The purported connection petitioners seek to draw between the public use requirement and the regulatory takings doctrine, while perhaps fodder for academic musings, finds no basis in the decisions of this Court or the lower courts resolving actual cases under the Taking Clause.

2. Even if the two admittedly distinct issues were related, petitioners offer no persuasive reason why that supports granting *certiorari* in this case. Petitioners assert that resolution of the "public use" issue in *Kelo* might create "confusion" in the lower courts over the substantial advancement test. Such speculation, however, is no basis for granting *certiorari*. Given the differences between these separate aspects of takings analysis, the likelihood that this Court's ruling in *Kelo* will have any relevance to regulatory takings cases such as this is remote at best. But even assuming such relevance, petitioners identify no reason why this Court should depart from its normal practice of leaving such issues to be developed in the first instance in the lower courts and waiting to see whether any actual confusion or conflicting decisions arises. As our brief in opposition demonstrates, unlike the application of the public use requirement to condemnations for private economic development at issue in *Kelo*, the substantial advancement test has been specifically addressed and repeatedly reaffirmed by this Court and has not occasioned any split in the lower courts.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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